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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STEPHEN SELDON, et al.,

Defendants.

Case No. 2:07-CR-001350KJD-LRL

ORDER

Currently before the Court is Defendant Stephen Seldon's Motion for New Trial and for Order Regarding Any Additional Brady Material (#313) to which Defendant Deborah Martinez Seldon filed a Motion for Joinder (#315). The Government filed a Response in Opposition (#316), to which Stephen Seldon filed a Reply (#322). Additionally before the Court is Plaintiff's Motion to Strike (#329) Defendant's Reply, and Supplemental Response (#339). Also before the Court is Defendant Stephen Seldon's Motion for an Immediate Order or Status Conference (#352).

I. Background

This Motion is the fourth post-trial motion filed by Defendants seeking either a new trial or to vacate their convictions following the jury's guilty verdict rendered in November 2008. For the sake of brevity, the Court will not recite the case history, but incorporates its previous citation of the case history in prior orders. (See ## 212, 235, 240, 243, 248, 253, 263, 264, 297, 310, 311, 312, 330, 334, 335.)

Defendants Stephen Seldon and Deborah Martinez Seldon bring the instant Motion pursuant to Brady v. Maryland, 373 U.S. 83 (1963), averring that the Government failed to disclose evidence which "directly refuted testimony of [the Government's Witness] Chad Livdahl on a "critical element of the Government's proof" at trial, arguing that the Government's failure to disclose an

1 affidavit made by Livdahl on January 18, 2005, during civil proceedings in the Southern District of
2 Florida seeking to enjoin sales of TRItox, undermines confidence in the outcome of the underlying
3 trial in this Court. Seldon additionally seeks that the Court order the prosecution to require its
4 agents, and others involved in the investigation of Livdahl's company, TRI, to examine all materials
5 collected in that investigation to determine the existence of additional undisclosed Brady
6 information. (#313 at 1.)

7 During the trial of this case, the Government introduced evidence through the testimony of
8 Chad Livdahl, that he sold 132 vials of Botulinum Toxin Type A to the Defendants on January 13 or
9 14, 2005. Here, Defendants aver that a sworn affidavit made by Livdahl in the Florida injunction
10 action, was material to the issue of Defendants' guilt here, but was never produced by the
11 Government during discovery. Specifically, the affidavit at issue states:

12 1) That Livdahl had personal knowledge of the whereabouts of all Botulinum Toxin
13 Type A that was not sold as of the date of the of restraining order issued by the
Florida court on December 23, 2004.

14 2) That Livdahl made no sales of Botulinum Toxin Type A between December 23,
15 2004, and January 18, 2005.

16 3) That pursuant to the Florida Court's order of January 11, 2005, Chad Livdahl had
17 delivered to an authorized FDA agent all Botulinum Toxin Type A in the
possession/control of any and all defendants.

18 (#313 Ex. A.) According to Defendants, the Government's theory at trial was centered upon a chart
19 demonstrating Defendants' patient files and "based upon the assumption that when a patient received
20 a cosmetic toxin, it was TRItox," and that the "primary corroboration for the assumption was
21 Livdahl's testimony that the Seldons had purchased 132 vials of TRItox from Livdahl in mid-
22 January, 2005. (See #313 at 2.) Defendants aver that because the affidavit was not produced, "the
23 jury never heard that [Livdahl] had denied that the sale occurred just days after it was supposed to
24 have happened in a sworn statement to the court in Florida." (Id.) The Defendants argue that this
25 omission is material and prejudicial to them. The Court does not agree.

1 II. Standard of Law

2 In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that “the suppression
3 by the prosecution of evidence favorable to an accused upon request violates due process where the
4 evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the
5 prosecution.” The Supreme Court has additionally noted that the duty to disclose such evidence is
6 applicable even when the defendant has not made a request for it. United States v. Agurs, 427 U.S.
7 97, 107 (1976). Such evidence is considered to be material “if there is a reasonable probability that,
8 had the evidence been disclosed to the defense, the result of the proceeding would have been
9 different.” Id., at 682; see also Kyles v. Whitley, 514 U.S. 419, 433–434 (1995). The Supreme
10 Court has set forth a three-part test for determining whether the suppression of evidence constitutes a
11 Brady violation: 1) “The evidence at issue must be favorable to the accused, either because it is
12 exculpatory, or because it is impeaching”; 2) “[T]hat evidence must have been suppressed by the
13 State, either willfully or inadvertently”; and 3) “[P]rejudice must have ensued.” Strickler, 527 U.S.
14 at 218–282.

15 A. Exculpatory or Impeaching

16 As stated above, Defendants aver that the affidavit from Livdhal’s Florida injunction
17 proceeding is exculpatory and/or impeaching for several reasons. Defendants aver inter alia that the
18 affidavit creates doubt that there was enough toxin available to Livdahl to support the Government’s
19 trial theory; that the affidavit corroborates the record on trial that Livdahl’s testimony regarding the
20 sale of the vials was false; and that the affidavit demonstrates that Livdhal’s testimony was made
21 only to cooperate with the Government so he would get a more lenient sentence.

22 An examination of the record demonstrates that the Defendants’ arguments are
23 unsubstantiated. “Newly discovered evidence to impeach a government witness does not warrant a
24 new trial when the evidence would not have affected the jury’s assessment of the witness’ credibility
25 and when the witness was subjected to vigorous cross-examination.” United States v. Marashi, 913
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1 F.2d 724, 732 (9th Cir. 1990)(citation omitted). During the trial in this case Livdahl admitted,
2 among other things, that he had given false testimony in the Florida injunction case. During trial,
3 counsel repeatedly questioned Livdahl about the sale itself, his failure to report the sale to the court
4 in Florida, and what he did with the money from the sale. (See, e.g., Tr. Day 7, pp. 1618, 1643–45,
5 1728–35.) While current counsel may have conducted cross-examination differently, the record
6 demonstrates that Livdahl was thoroughly cross-examined regarding the secret sale of the 132 vials
7 to the Defendants in January 2005, and that the Defendants had ample opportunity to develop
8 evidence (or argue inferences) that the sale did not occur. The Court finds that additional evidence to
9 this effect, or further impeaching Livdahl regarding the subject, would be cumulative and immaterial.

10 At trial it was established that Livdahl was currently serving a nine-year prison sentence for
11 his role in creating and distributing TRItox. (TR. Day 6 p, 1471.) It was established that Livdahl
12 told a series of lies, while under oath, in Federal Court in Florida, relating to his marketing of TRItox
13 and its use on humans, and for which he was charged with perjury. (TR. Day 6. 1553–56). Livdahl
14 admitted on the stand that he had testified in another case against a physician and had cooperated
15 with government investigators in the hope of receiving a reduction in his sentence. It was also
16 established that Livdahl surreptitiously made changes to the Defendants' computer system to erase
17 reference to Botox procedures. (TR. Day 6, p. 1560–65.) Additionally, Livdahl admitted under oath
18 that he had violated the Florida District Court's order not to dispose of any additional vials of
19 TRItox, by selling the 132 vials of TRItox to the Defendants in January 2005. (TR. Day 7, p. 1591.)
20 Thus, any dissonance alleged to arise from the affidavit at issue is repetitious of Livdahl's admissions
21 of perjury regarding the topic at trial and would not have affected the jury verdict. (#316 at 11.)
22 Livdahl's proclivity for dishonesty was firmly established and he was thoroughly impeached during
23 trial.¹

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25 ¹Moreover, the Court notes that the affidavit at issue would not likely have affected the jury verdict because the
26 inculpatory aspects of Livdahl's testimony were corroborated by additional evidence such as Deborah Seldon's

1 **B. Suppression**

2 As stated above, under Brady, the Plaintiff must demonstrate that the Government
 3 “suppressed” evidence. The Ninth Circuit has held that there is no Brady violation where defendants
 4 had “all the information necessary for [them] to discover the alleged Brady material on their own.”
 5 United States v. Bracy, 67 F.3d 1421, 1428–29 (9th Cir. 1995). Additionally, the Ninth Circuit has
 6 found that when, “a defendant has enough information to be able to ascertain the supposed Brady
 7 material on his own, there is no suppression by the government.” United States v. Aichele, 941 F.2d
 8 761 (9th Cir. 1991)(citing United States v. Dupuy, 760 F.2d 1492, 1501 n. 5 (9th Cir. 1985). “Where
 9 defendants . . . had within their knowledge the information by which they could have ascertained the
 10 supposed Brady material, there is no suppression by the government.” Id. (citing United States v.
 11 Griggs, 7813 F.2d 672, 674 (11th Cir. 1983)).

12 The January 2005 affidavit at issue here was filed in the course of civil litigation in which the
 13 United States Attorney in the Southern District of Florida sought to enjoin further sales of the TRItox
 14 product. The pleading to which the affidavit is appended bears the case number 0:04-cv-61717-JIC,
 15 and is publically available on the federal court’s electronic docketing system website. Defendant
 16 buttresses its suppression claim by arguing that because the Government ordered and provided
 17 transcripts of Livdahl’s trial testimony—not available on the court’s electronic docket—to
 18 Defendants’ counsel prior to the underlying trial, yet neglected to provide a copy of Lidvahl’s
 19 affidavit, they purposely suppressed the document. (See #322 at n. 2.) The Court disagrees. The
 20 Government avers that it did not purposefully suppress the affidavit, and states that “it is not now,
 21 nor has it ever been in possession of the January 2005 affidavit.” (#316 at 4.) Moreover, the trial
 22 transcript here demonstrates that Defendants were unmistakably aware of the injunctive proceeding

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 24 Southwest Airline tickets purchased on the day of her travel to meet Livdahl in Arizona and extrinsic evidence supporting
 25 Livdahl’s claim that he made changes to Defendants’ computer system, and helped the Defendants peel the labels off of
 26 the TRItox vials he sold to them.

1 against Livdahl in Florida, and even used material from the case to impeach Livdahl during cross-
2 examination. (Tr. Day 7, pp. 1618, 1643–45.) The Government’s disclosure provided all the
3 information necessary for the Defendants to discover the alleged Brady material.

4 Moreover, Defendants cannot state unequivocally that Livdahl’s affidavit was not provided or
5 available to them prior to trial. Rather, the instant Motion states that after examination of discovery
6 and consultation with trial counsel “to the best of counsel’s knowledge and belief” the affidavit was
7 not provided. (#313 at 2.) The Court is keenly aware that both Defendants have been represented by
8 various attorneys since the trial of this matter, and that allegations of ineffective assistance of
9 counsel, misconduct, and conflict of interest have been alleged against trial counsel. Without
10 weighing in on any allegations that have been made against Defendants’ counsel at trial, that said
11 counsel cannot unequivocally state that the affidavit was not made available to them, weighs against
12 a finding of suppression.

13 For the reasons stated above, the Court finds that the Government did not suppress any
14 evidence favorable to Defendants warranting a new trial. See United States v. Aichele, 941 F.2d
15 761, 764 (9th Cir. 1991).

16 **C. Prejudice**

17 As touched upon above, evidence is material only “if there is a reasonable probability that,
18 had the evidence been disclosed to the defense, the result of the proceeding would have been
19 different.” United States v. Bagley, 473 U.S. 667, 682 (1985). When making a Brady determination
20 regarding prejudice, the court must analyze the withheld evidence “in the context of the entire
21 record.” United States v. Agurs, 427 U.S. 97, 112 (1976). The Court may find a reasonable
22 probability that the result of the proceeding would have been different even if the remaining evidence
23 would have been sufficient to convict the defendant. Strickler v. Greene, 527 U.S. 263, 290 (1999).
24 Additionally, the court may find a reasonable probability without finding that the outcome would
25 more likely than not have been different. See Kyles v. Whitley, 514 U.S. at 434. Rather, “[a]
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1 ‘reasonable probability’ of a different result [exists] when the government’s evidentiary suppression
2 ‘undermines confidence in the outcome of the trial.’” Id. (quoting Bagley, 473 U.S. at 678).

3 Because the materiality of suppressed evidence is “considered collectively, not item by item”,
4 Kyles v. Whitley, 514 U.S. at 436, here, the Court evaluates the “net effect” of all evidence regarding
5 Livdahl’s testimony and the alleged sale of the 132 vials of TRItox to the Defendants in making its
6 suppression consideration. When considered together with all evidence presented during the
7 underlying trial, the information contained in Livdahl’s Florida affidavit does not undermine the
8 outcome of the jury verdict. Accordingly, the Court finds that Defendants did not suffer prejudice
9 due to the Government’s failure to disclose the affidavit, and the Court finds that the three-part test
10 for determining whether the alleged suppression of evidence constitutes a Brady violation has not
11 been met. In fact, there is no evidence that the affidavit was withheld or suppressed by the
12 prosecution.

13 III. Conclusion

14 Accordingly, **IT IS HEREBY ORDERED** that Defendant Stephen Seldon’s Motion for New
15 Trial and for Order Regarding Any Additional Brady Material (#313) and Defendant Deborah
16 Martinez Seldon’s Motion for Joinder (#315) are **DENIED**.

17 **IT IS FURTHER ORDERED** that Defendant Stephen Seldon’s Motion for an Immediate
18 Order or Status Conference (#352) is **DENIED** at moot.

19 **IT IS FURTHER ORDERED** that Plaintiff’s Motion to Strike (#329) is **DENIED**.

20 DATED this 12th day of January, 2011.

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24 Kent J. Dawson
25 United States District Judge
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